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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Review of the Pioneer's
Preference Rules

ET Docket No. 93-266

COMMENTS OF QUALCOMM INCORPORATED

QUALCOMM Incorporated ("QUALCOMM"), by its attorneys, hereby files these comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above proceeding.¹ In the NPRM, the Commission, without taking a position on the issue, invited comments on its pioneer's preference rules and the impact the proposed competitive bidding process² may have on the continued viability of these rules. In short, the Commission raised two principal questions in the NPRM:

1. Should the pioneer's preference rules be repealed in response to the proposed implementation of competitive bidding in cases of mutually exclusive applications?
2. If not, how, if at all, might the rules be amended to reduce administrative burdens in light of the Commission's previous experience with pioneer's preferences?

¹ Review of the Pioneer's Preference Rules, ET Docket No. 93-266, FCC No. 93-477 (October 21, 1993).

² See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 1007 Stat. 387, enacted August 10, 1993; Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, FCC No. 93-455 (October 12, 1993).

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QUALCOMM supports the Commission's reexamination of the pioneer's preference rules and concludes that the Commission should use this proceeding to reaffirm its commitment to the pioneer's preference. Notwithstanding its support for the continued viability of the pioneer's preference rules, QUALCOMM seeks clarification of some of the administrative issues raised in the NPRM.

Background

The Commission's pioneer's preference rules were intended to foster development of technology and services by reducing the delays and risks faced by innovators. Specifically, the Commission's pioneer's preference Order³ expressed the concern that the time and money innovators had to commit to the licensing process, with little certainty of successfully obtaining a license, created disincentives for innovators to propose new services or technologies. The rules were developed and promulgated in the context of two methods of awarding licenses: comparative hearings and random selection. However, it should be noted that members of the Commission were aware at the time of adoption of the pioneer's preference rules that Congress was considering providing authority for use of competitive bidding to award licenses.⁴

³ Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd. 3488, 3489 (1991).

⁴ Congress had considered competitive bidding prior to the adoption of the pioneer's preference rules in 1991. For example, the 101st Congress considered HR2965 and S2904 in 1990. HR2965 was passed by the House of Representatives. Both bills proposed competitive bidding for FCC licenses. See 1990 Congressional Quarterly Almanac, Vol. XLVI at 376-377.

As the Commission notes in its NPRM, the competing bidding process will alter the current system of awarding licenses.⁵ Theoretically, an interested party may obtain a license by paying a high enough price, so long as that party has sufficient financial resources to support the bid. Based on this new process, the NPRM suggests that the marketplace will eliminate the need for pioneer's preferences because:

the value of the innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s).

QUALCOMM does not endorse this view of the impact of competitive bidding and encourages the Commission to maintain the existing pioneer's preference rules, without which there is no real "value" to the innovation in the marketplace.

The Pioneer's Preference Rules Should Be Retained

QUALCOMM believes the fundamental policies underlying the Commission's pioneer's preference rules continue to be beneficial and in the public interest, notwithstanding the recent competitive bidding legislation. Therefore, repeal of the rules is inappropriate. The rules do create incentives for innovators to bring to the marketplace new ideas. Although implementation of the rules has proven to be difficult, the Commission should not discard a beneficial program merely because it is not easy.

As the Commission is well aware, the competitive bidding process was approved by Congress to (i) permit the government to recover revenue that previously went to winners under random selection and (ii) accelerate the authorization process.

⁵ NPRM at 3.

QUALCOMM supports these goals but notes that implementation of competitive bidding does not improve the opportunities afforded to innovators in a way that warrants eliminating the pioneer's preference rules.

The Commission's NPRM suggests that a pioneer will be able to obtain spectrum more easily via competitive bidding than it could have under the random selection process previously used for mutually exclusive applications. In particular the Commission suggests that:

Establishment of competitive bidding authority creates a new dynamic for the assignment of licenses. Specifically, a bidder, who may also happen to be an innovator, through its bidding efforts would primarily control whether it obtains the desired license. It may obtain the license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists.

QUALCOMM believes that although there may be some validity to the Commission's suggestion, the auction legislation has not changed the dynamics of the marketplace to the extent the Commission assumes. In fact, under competitive bidding, an innovator will be in the same exact position as any other bidder searching for funding to support the bid. In this way, the position of the innovator is no better under competitive bidding than it was under lotteries, and is probably worse than the innovator's position was under comparative hearings where the Commission had the flexibility to favor innovative applications. Thus, QUALCOMM notes that removal of the pioneer preference rules will eliminate the incentive to innovation under a regime which does not otherwise promote innovation.

QUALCOMM further notes that even under the previous comparative hearing or random selection regimes, well funded and legally qualified entities that have been unable, for whatever reason, to obtain an initial authorization have usually been able to obtain the spectrum they need in the secondary market.⁶ Thus, the marketplace forces that the Commission suggests will come into play under competitive bidding were in place when the Commission adopted the pioneer's preference rules.

Similarly, start up entities with innovative ideas but no funds have always been able to go to the financial community to attempt to raise the capital required to obtain spectrum either through the Commission's processes or the secondary market. The implementation of competitive bidding will not make it easier for innovators to obtain financing. Thus, the justifications which supported the initial implementation of the pioneer's preference have not changed in a way that eliminates the need for these rules. QUALCOMM believes, that while the use of auctions, as the Commission observes, "creates a new dynamic for the assignment of licenses," it does not change the rationale for awarding pioneer's preferences. Instead, competitive bidding may decrease the chance for underfunded but innovative technologies to come to market. As a result, pioneer's preferences may be even more compelling in a competitive bidding situation. Consequently, the Commission should retain its pioneer's preference rules.

⁶ The cellular service provides the best example of this mechanism. Although the Commission has issued more than 1400 cellular authorizations to a diverse group of licensees, those licenses have been sold to a small number of carriers who now provide service to the majority of cellular users.

The Commission Should Clarify the Administrative Amendments Proposed in the NPRM

(1) Specificity

The Commission's NPRM indicates that consideration of "raw experimental license material" as part of the initial pioneer's preference decisions "may burden unnecessarily both the Commission's staff and the public with no offsetting public benefit." The Commission also observes:

Our experience also convinces us that a pioneer's preferences applicant should be required to incorporate only relevant experimental material into its preference request, rather than submitting its entire experimental file as part of the request. Since only a portion of the experimental file is relevant to the request, we believe that the applicants should select and explain the material that they submit.

QUALCOMM agrees with both statements. QUALCOMM also believes, however, that the Commission can further reduce administrative burdens and confusion by specifying in its awards very precisely the exact nature of the technology it deems pioneering. That is, in any tentative decision or final decision awarding a pioneer's preference, the Commission should explicitly identify (i) the pioneering technology, (ii) where interested persons can find a complete description of the technology, and (iii) how the technology relates directly to a new or an existing service. It makes little sense to award a preference to an "innovator" with a technology that is not new. It makes even less sense to award a preference in the case of a technology that will never be used to

provide a new service or to enhance the provision of an existing service. Specifying the exact nature of the innovative technology will help to avoid these outcomes.

(2) Clarify "new" and "existing" service

QUALCOMM also requests that the Commission clarify its statement that,

Transferring a technology from an existing service in a lower band to a "new" service in a higher band should not be recognized by award of a pioneer's preference.

First, QUALCOMM believes the Commission should make it clear that the language "a technology from an existing service," refers to a technology which is actually being used to provide a service which exists at the time the preference request is filed, not a service which is implemented after the filing date. Thus, an innovative technology which can be applied to more than one new service should be eligible for a preference in all services that are not existing services. QUALCOMM also believes the Commission should make it clear that an innovator that develops a new technology that both significantly improves an existing service and, additionally, may be used to provide a new service in a different band is eligible for a preference in the new service.

The Commission also should clarify what it means by, "a 'new' service operating in a higher band." In its recent PCS order, in which it established Personal Communications Services (PCS) operating at 1800 MHz and 2 GHz, the Commission defined broadband PCS as follows:

Radio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

In the same order, the Commission amended section 22.930 of its rules, 47 C.F.R. § 22.930.

That section now reads in pertinent part as follows:

Cellular system licensees may employ alternative technologies and may provide auxiliary common carrier services, including personal communications services . . . on their assigned cellular spectrum.

QUALCOMM is asking the Commission to clarify that both PCS service at 1800 MHz and PCS services in the expanded cellular service must be viewed as a "new service" eligible for a pioneer's preference.

(3) Application of New Rules to Tentative Grants

The Commission's NPRM asks for comment on whether any amendment of the rules should apply to proceedings in which the Commission has made tentative preference grants. QUALCOMM believes that if the Commission adopts new rules or policies that increase the nexus between a pioneering technology and the relevant service, it should apply such rules or policies to the proceedings in which it has made tentative grants. Such action would put the preference awards on firmer technical and legal ground.

Conclusion

For the foregoing reasons, QUALCOMM Incorporated asks that the Commission accept these comments and take the actions proposed herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Albert Shuldiner", is written over a horizontal line.

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